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IN THE

Supreme Court of The United States

OCTOBER TERM 1970

NO. [illegible] 70-5082

LAVERNE CARTER, SUSAN BOWMAN, EVA CARTER, DOROTHY ENOCH, LILLY SALL and BRENDA STEELE et al,

Appellants (Plaintiffs below),

v.

WAYNE STANTON, Director, Marion County Department of Public Welfare, WILLIAM STERRETT, Director, Indiana State Department of Public Welfare, et al,

Appellees (Defendants below).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

APPELLEE WAYNE STANTON'S MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of The United States

OCTOBER TERM 1970

NO. 6744

LAVERNE CARTER, SUSAN BOWMAN, EVA CARVER, DOROTHY ENOCH, LUCY HALL and BRENDA STEELE et al,
Appellants (Plaintiffs below),

v.

WAYNE STANTON, Director, Marion County Department of Public Welfare,
WILLIAM STERRETT, Director, Indiana State Department of Public Welfare, et al,
Appellees (Defendants below).

On Appeal From The United States District Court For The Southern District Of Indiana, Indianapolis Division

APPELLEE WAYNE STANTON'S MOTION TO DISMISS OR AFFIRM

Appellee Wayne Stanton moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the Southern District of Indiana, on the grounds that the questions presented are so unsubstantial as not to require further argument and that the decision of the District Court is so patently correct as to warrant no further review.

STATUTE AND REGULATION INVOLVED

The Social Security Act of 1935 § 406(a); 42 U.S.C. § 606(a), defines the term "dependent child" as follows:

> "The term 'dependent child' means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, . . ."

The Indiana regulation under attack is Public Welfare Regulation 2-402(b) [Burns' Indiana Admin. Rules and Regulations (52-1001)-2(b)], which regulation reads as follows:

> "When the continued absence is due to desertion or separation, the absence shall have been continued for a period of at least six (6) months prior to the date of application for assistance to dependent children; except that under exceptional circumstances of need and where it is determined that the absence of a parent is actual and bona fide an application may be filed and a child may be considered immediately eligible upon a special finding of the county department of public welfare setting forth the facts and reasons for such action."

QUESTIONS PRESENTED

1. Whether a substantial Federal question is raised by the quoted Indiana Welfare Regulation which uses a six-month continuous absence of a parent as a condition for assistance, but which also contains an exception allowing immediate assistance within that period under exceptional circumstances of need and where it is determined that the absence of the parent is actual and bona fide.

2. Whether the Appellants should have exhausted their available administrative remedies before seeking relief in the Federal Court.

CRUCIAL FACTS

(a)

Concerning "Continued Absence"

The Appellants claim that Indiana State Board of Public Welfare Regulation 2-402(b) is unconstitutional because, they allege, it requires a six-month separation of parents before assistance may be granted dependent children and allows undue discretion in determining who may file an application. The Appellants also claim that the practice of the Marion County Department of Public Welfare requires a parent to file for legal separation or divorce before the parent's children may receive assistance and refuses the filing of an application by persons who have not yet proved an actual and bona fide separation.

Contrary to the implications in the Appellants' statement of the case and the Appellants' claim, the record discloses that the policy and practice of the Marion County Department of Public Welfare requires acceptance of an application for any individual who wishes to file, and that each of the named Appellants was granted the right to file, and did file, an application for AFDC assistance.

The record reveals that, in practice, AFDC assistance is granted if the need exists and the continued absence of a parent is found to be actual and bona fide, without awaiting a six-month absence *or* the filing of a petition for divorce or separation. Filing for separation or divorce is only one of the many relevant factors bearing upon whether the continued absence is actual and bona fide. Thus, Appellant Lucy Hall received assistance effective less than three months after she separated from her hus-

band, yet she *never* filed for divorce or separation. The six-month period in the regulation under attack is waived regularly by the Marion County Department of Public Welfare when the need exists and the absence is actual and bona fide.

(b)

Concerning "Need"

In determining need and eligibility, the County Department considers all relevant factors including whether the applicant is receiving assistance from other agencies or sources during the interim waiting period. Each named Appellant who requested interim assistance from the Township Trustee received such assistance in various forms. There was no evidence that Appellee Stanton or any of his agents acted arbitrarily or capriciously or that the Appellants suffered irreparable harm. Instead, the record establishes that the regulation is applied according to uniform standards and tests of need. The measure of need in cases of actual and bona fide absence is the same regardless of the duration of the absence.

(c)

Concerning "Administrative Remedies"

No administrative appeals were taken from the Marion County Department of Public Welfare's determination although such administrative procedure was available and known to the Appellants or their attorneys. Such appeals are heard within one or two weeks and a decision rendered within the following two weeks.

ARGUMENT

I

NO SUBSTANTIAL FEDERAL QUESTION INVOLVED

Neither the regulation under attack nor its application presents any substantial federal question.

(a)

The Regulation

Regulation 2-402(b) *does not necessarily* withhold assistance while awaiting expiration of the six-month period of absence. There is no rigid waiting period under the Indiana regulation which would make it unreasonable, unconstitutional or inconsistent with the Social Security Act. The regulation, instead, authorizes immediate assistance at any time after application if circumstances of need exist and if the absence is actual and bona fide. Surely, this is not unreasonable. As stated by the three-judge court in the rehearing in *Damico v. California*, 2 Pov. L. Rep. § 10,478 (N.D. Calif. 1969):

> "We hold that under the Social Security Act, the state may not deny AFDC benefits to otherwise eligible children by means of a *conclusive presumption* that an absence is not 'continued' before the expiration of three months. *In so ruling, we do not hold that the state may not set up a reasonable time period as a rebuttable evidentiary guide to determine what constitutes a 'continued absence' in the absence of other factors. The state correctly argues that 'continued absence' cannot be attained in an instant but must endure for some period.* Conversely, however, the 'con-

> tinued' nature of the absence may be apparent, in an appropriate case, from the very early days of the separation. Protection of the needy children deprived by such an absence is required by the Federal Act. We hold only that the Department of Social Welfare must, in passing upon an application for Aid to Families with Dependent children, consider all relevant facts in determining whether the particular absence is 'continued.' " [Emphasis added].

The Indiana regulation differs materially from the regulations attacked in *Doe v. Hursh,* 2 Pov. L. Rep. § 11,753 (D. Minn. 1970) and *Damico v. California,* supra, upon which the Appellants depend.

In *Damico,* the regulation prohibited aid prior to three months of continued absence unless legal action was taken to terminate the marriage or the parent was deported or incarcerated. The quoted "conclusive presumption" which flawed the California regulation is missing from the Indiana regulation. This clearly differentiates the two.

In *Doe,* the Minnesota statute created an irrebuttable presumption that separation for less than three months was not "continued absence from home." No evidence was permitted by which this presumption could be overcome. Children were ineligible even if the absent parent had left permanently or had been ordered out of the house in a divorce action. The Indiana regulation contains no such rigid prohibitions but, on the contrary, flexibly permits *immediate* assistance.

The Indiana regulation has a reasonable basis and does not offend the constitution. The majority of the Court in *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153 (1970) laid down reasonable and practical guides protecting the interests of both the state and the recipient in the administration of public welfare (90 S. Ct. at page 1158):

". . . that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." Id., at 318-319.

"Congress was itself cognizant of the limitations on state resources from the very outset of the federal welfare program. The first section of the Act. 42 U.S.C. § 601, provides that the Act is

> 'For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services *as far as practicable under the conditions in such State,* to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . .'

"Thus the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds . . ." [Emphasis added]

• • •

"In the area of economics and social welfare, a State does not violate the Equal protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78.

"The problems of government are practical ones and may justify, if they do not require, rough accommo-

dations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70. "*A Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*" *McGowan v. Maryland,* 366 U.S. 420, 426. [Emphasis added]

• • •

"We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But *the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration,* Goldberg v. Kelly, ante. *But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf.* Steward Mach. Co. v. Davis, 301 U.S. 548, 584-585; Helvering v. Davis, 301 U.S. 619, 644. *The judgment is reversed.*" [Emphasis added].

(b)

Application of Regulation

The record establishes that the Indiana regulation is applied according to uniform standards and tests. Moreover, in order to afford the applicants practical protection from a mistaken decision of a case worker and to assure constitutional application of the regulation, procedural safeguards are available. Under Indiana law each claimant under the AFDC program is provided the right to appeal

any decision made by the case workers or supervisors at the county level, whether it be a denial of the right to file an application, denial of assistance after the filing of an application, or dissatisfaction with the amount of the grant. *Burns' Ind. Stat. Ann.* § 52-1246.

Absence for six months is not a mandatory condition for assistance under the Indiana regulation. The exception contained in the regulation provides for determination only that the absence is actual and bona fide. Assuming need is found, "a child may be considered immediately eligible" upon a special finding that the absence of the parent is actual and bona fide.

Contrary to the Appellants' claim, a petition for separation or divorce is not a prerequisite to receiving assistance where the absence of the parent is less than six months. Many factors are examined and considered, including whether the separation is of a short term, or repetitive, or continuous, or a common practice, or a casual absence—or, on the contrary, is actual and bona fide. The record establishes that the six-month period is waived regularly.

In conclusion, both in its language and in its application, the Indiana regulation violates no constitutional or federal standard. It is flexible, and its application is reasonable and gauged by determined relevant factors of need and eligibility. The regulation deserves a construction of constitutional validity in accordance with the "well known doctrine that a statute [and equally a regulation] is to be construed as constitutional when such construction is possible." *Metcalf v. Swank* 293 F. Supp. 268 (N.D. Ill. 1968); *Harmon v. Brucker,* 355 U.S. 579, 581, 78 S. Ct. 433, 2 L. Ed. 2d 503 (1958).

II

APPELLANTS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

Administrative remedies must be exhausted before seeking extraordinary equitable relief when the pursuit of administrative remedies might ordinarily render judicial determination of the issues unnecessary. *Chicago Automobile Trade Association v. Madden*, 328 F. 2d 766 (7th Cir. 1964), *cert. denied* 377 U.S. 979 (1964); *Metcalf vs. Swank*, 305 F. Supp. 785 (N.D. Ill. 1969); *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951). This is especially so when there is no substantial federal question involved and the administrative remedy is adequate and speedy.

The Appellants' contention that they were not required to exhaust their state administrative remedies for the reason that they were asserting a violation of their civil and constitutional rights is answered in *Metcalf v. Swank*, 305 F. Supp. 785 at page 788 (N.D. Ill. 1969):

> "The plaintiff contends that she need not exhaust the administrative remedies provided by Illinois law because she is asserting a violation of her civil and constitutional rights, and federal jurisdiction is invoked under 28 U.S.C. § 1343. It is the plaintiff's contention that in all cases where federally protected rights are allegedly violated by a state administrative agency, a complainant may bypass the orderly procedures established by that agency, the procedures for review of the agency's actions established by state law, and sue its officers in a federal court at any stage. This court does not agree.
>
> "*The rule that administrative proceedings must be exhausted prior to resort to judicial relief has been consistently recognized by the Supreme Court.* E. g.,

Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341, 71 S. Ct. 762, 95 L.Ed. 1002 (1951); Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796 (1947). Recently, the Supreme Court has exempted actions brought under the Civil Rights Act from the exhaustion requirement under certain conditions. McNeese v. Board of Education, 373 U.S. 668, 83 S. Ct. 1433, 10 L.Ed]d 622 (1963); Damico v. California, 389 U.S. 416, 88 S. Ct. 526, 19 L.Ed.2d 647 (1967), Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L.Ed2d 1319 (1968); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed2d 1118 (1968). *However, this court does not read the foregoing decisions as giving civil rights plaintiffs the unqualified right to bypass state administrative remedies.* Not one of the decisions relied upon by the plaintiff presented a situation where there was a speedy, viable state administrative remedy which the plaintiff could have pursued. Under the particular circumstances presented in each case, pursuance of administrative procedures would have been futile. Such is not the case here. the defendants administer a statute constitutional on its face. That statute has built in procedural safeguards, and provides for a speedy determination of administrative appeals. The plaintiff may pursue her administrative appeals without undergoing deprivation of the public assistance funds she presently receives. It is purely speculative at this point whether or not the plaintiff would receive an exception to the shelter allowance maximum if she pursued her administrative remedies. [Emphasis added].

Likewise, as stated by the Court in *Eisen v. Eastman*, 421 F. 2d 560 at page 569 (2nd Circuit 1969), which dealt with the exhaustion of state administrative remedies in a civil rights case:

[13] Despite the breadth of some of the language, particularly in the *Damico* per curiam, we thus read

these decisions as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate, as in *McNeese*, or where it is certainly or probably futile, as in *Damico*, *Smith* and *Houghton*. A quite different situation would be presented, for example, when a complaint alleged that a subordinate state officer had violated the plaintiff's constitutional rights by acting because of bias or other inadmissible reasons, by distorting or ignoring the facts, or by failing to apply a constitutional state standard, and the state has provided for a speedy appeal to a higher administrative officer, as New York City has done here. *We shall need much clearer directions than the Court has yet given or, we believe, may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal question jurisdiction.*
Affirmed. [Emphasis added]

Neither the Appellants here nor their lawyers sought the available administrative remedies, although the record reveals that after the filing of an appeal a hearing is scheduled within a week or two and decided approximately two weeks later.

Burns' Ind. Stat. Ann. § 52-1246 provides in pertinent part:

"The county department shall at once report to the state department its decision upon each such application for assistance to a dependent child. *If any such application is not acted upon by the county department within a reasonable time after the filing of the application, or if such application is denied, or if assistance previously granted is modified or revoked, the applicant may appeal to the state department in*

the manner and form prescribed by the state department. The state department shall, upon receipt of such an appeal, give the applicant an opportunity for a fair hearing thereon. The state department may also, upon its own motion, review any decision of a county department, and may consider any application upon which a decision has not been made by the county department within a reasonable time. . ." [Emphasis added].

To supplement the administration of such appeal, rules of administrative procedure were promulgated by the Board of Public Welfare as authorized by the legislature in *Burns' Ind. Stat. Ann.* § 52-1103. *Burns Indiana Rules and Regulations Annotated* § 52-1246 specifically provides procedure for an appeal from a county department decision and its pertinent part reads as follows:

"(a) If the county department of public welfare refuses to accept an application for assistance to dependent children; *or* if an application is not acted upon by the county department of public welfare within a reasonable time or within sixty (60) days after the filing of the application; *or* if an applicant is dissatisfied with the amount of the award; *or* if an award previously made is modified; *or* if any application is denied or revoked, the applicant or recipient may appeal to the state department of public welfare. Such appeal shall be in writing over the signature or mark of the applicant or recipient and shall be filed with the county or state department of public welfare. *Every applicant or recipient shall be notified of his right of appeal to the state department of public welfare at the time of his application, and concurrently with each grant, denial, or modification of award.*

"(b) Upon notice given by the state department of public welfare, the county department of public welfare *shall review the appellant's situation promptly* and submit a report of the situation to the state de-

partment of public welfare. After due investigation and consideration, the state department of public welfare shall notify the appellant and the county department of public welfare in writing of any action taken and any preliminary finding of fact upon the review of the case and of his right to have scheduled a fair hearing in person before a representative of the state department of public welfare. The state department of public welfare shall inform the appellant and the county department of public welfare of the date and place of any hearing.

"(c) Any such fair hearing shall be held at a place convenient to the appellant and shall be conducted by the administrator, the director of the division of public assistance or by any qualified officer or employee of the state department of public welfare duly designated by the administrator or the director of the division of public assistance to hold and make decisions upon such hearings. The hearing shall be informal and shall provide an opportunity for all persons who have pertinent information to be heard promptly. The appellant may be represented by any person of his own choice.

"(d) Within a reasonable time after the conclusion of a fair hearing, the person who conducted the hearing shall report his findings of fact and decision upon the hearing. Such appeal decisions will be based on the law, rules and regulations of the state department of public welfare, and policies officially adopted by the county board of public welfare, and shall be signed by the administrator or the director of the division of public assistance. A copy of the decision shall be sent to the appellant and to the county department of public welfare. *The appellant shall also be notified that the state board of public welfare will review his case personally upon his specific request.*"
[Emphasis added].

"(e) The decision of the state department of public welfare shall be binding upon the county department

of public welfare, *and shall be put into effect immediately* by the county department of public welfare. Such decision does not preclude the county department of public welfare from modifying the award thereafter, under the provisions of the Welfare Act of 1936 [Burns' Stat. §§ 52-1001—52-1417] as amended, to meet changed conditions.

"(f) The appellant may withdraw his appeal at any point in the procedure by submitting a signed request to the state department of public welfare. [Bd. of Public Welfare, Reg. 2-408, adopted Feb. 21, 1946, filed March 27, 1946, eff. Apr. 6, 1946]." [Emphasis added].

It is obvious from the foregoing that Indiana provides a speedy and adequate remedy which the Appellants could and should have pursued.

III

INTERIM RELIEF BY TOWNSHIP TRUSTEE

The record reveals that the Township Trustee has a statutory duty to provide immediate assistance pending the processing of AFDC applications. In fact, of the five named Appellants who testified at the preliminary hearing, all except one were receiving interim assistance from the township trustee. The one exception, Appellant Steele, admitted that she had no problems as far as need was concerned. These facts refute the appellants' dramatic description of their plight and illustrate that relief in Indiana is available during any interim period while waiting AFDC assistance from the county welfare department. *Burns' Ind. Stat. ann.* § 52-144 provides:

"The township trustees of the several townships of this state shall be ex officio the *overseers of the poor within their respective townships, and shall perform*

all duties with reference to the poor of their respective townships that may be prescribed by law. Every township trustee shall, in discharging the duties prescribed in this act [§§ 52-144-52-176, 52-177-52-181], be designated an overseer of the poor. [Acts 1935, ch. 116 § 1, p. 432]." [Emphasis added]

As "overseer of the poor" the Township Trustee is required to perform the following duties as provided in *Burns' Ind. Stat. Ann.* § 52-148:

> "The overseer of the poor in each township *shall have the oversight and care of all poor persons* in his township so long as they remain (in) a charge, and shall see that they are properly relieved and taken care of in the manner required by law. *He shall, in cases of necessity, promptly provide medical and surgical attendance for all of the poor in his township who are not provided for in public institutions;* and shall also see that such medicines and/or medical supplies and/or special diets and/or nursing as are prescribed by the physician or surgeon in attendance upon the poor are properly furnished. The township trustee may, in cases of necessity, authorize the payment from township poor relief funds for water, gas and electric services, including the payment of delinquent bills for such services, when necessary to prevent their termination or to restore terminated service. He may, in cases of necessity, authorize the payment from township poor relief funds for lunches furnished to any child by the school in which the child attends classes, whenever the parent or other person responsible for such child is found to be financially unable to pay for such lunches. . . ." [Emphasis added].

Where temporary and immediate assistance is needed, *Burns' Ind. Stat. Ann.* § 52-150 *provides:*

> "Whenever an overseer shall ascertain by investigation that any poor person or persons or family require

assistance, he shall furnish to them such temporary aid as may be necessary for the relief of immediate and pressing suffering; before any further final or permanent relief in any case is given, the overseer shall consider whether distress can be relieved by other means than an expenditure of township funds . . ."

CONCLUSION

By reason of the foregoing Appellee Wayne Stanton respectfully submits that the decision of the three-judge Federal Court from which this appeal has been taken should be dismissed or, in the alternative, that said appeal should be affirmed in all things without further review.

Respectfully Submitted,

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